



## Book Reviews

### Civil Religion and Its Discontents

CONSTITUTIONAL FAITH. By Sanford Levinson.† Princeton: Princeton University Press, 1988. Pp. xii, 250. \$19.95.‡

Reviewed by Akhil Reed Amar\*

What does it mean to be an American? What (if any) “sacred ties” bind us together as a special people with a special destiny? And what is the proper place for quasi-religious icons, like the flag, and creedal affirmations, like the Pledge of Allegiance, in constituting ourselves as a special community? These timely questions have been sharply posed in recent months by the presidential campaign of George Bush, a proud, albeit adopted, son of the Lone Star state. But these questions are more than timely—they are timeless. Indeed, months before the general election took shape, these and related questions were posed with even more crispness—and with far more elegance, eloquence, and thoughtfulness—by another adopted son of Texas, Professor Sanford Levinson.<sup>1</sup>

At the outset of his book *Constitutional Faith*, Professor Levinson promises “many more questions than answers in the pages to come”<sup>2</sup>—and he is true to his word. This book is not for those who seek quick solutions to deep issues. But for those who savor seriousness and sincerity, for those left unsatisfied by the recent campaign’s fast-food, thirty-second-ad-bite approach to enduring questions of American identity, *Constitutional Faith* is appetizing and nourishing fare. The book, however, will leave some readers, especially lawyers, hungry for more—more determinacy, more answers, more traditional legal analysis, more attention to legal process concerns—than Professor Levinson has chosen to serve up.

In Part I of this Review, I present a detailed account of Professor Levinson’s arguments. In Part II, I offer a few of my reactions.

† Charles Tilford McCormick Professor of Law, The University of Texas School of Law.

‡ Hereinafter cited by page number only.

\* Associate Professor of Law, Yale Law School. B.A. 1980, J.D. 1984, Yale University.

1. Yet a third son of Texas, Bill Moyers, contributed comments for the dust cover of Professor Levinson’s book.

2. P. 4.

## I. The Words of Levinson's Mouth

As suggested by the book's title, Professor Levinson's central goal is to explore the idea of American "civil religion"<sup>3</sup> by making "clearer the ambiguities of 'constitutional faith,' i.e., wholehearted attachment to the Constitution as the center of one's (and ultimately the nation's) political life."<sup>4</sup> What follows is not the kind of traditional "linear argument aimed at moving the reader toward some purportedly ineluctable conclusions (e.g., 'this, and this alone, is the one best way to perceive the Constitution')"<sup>5</sup> that characterizes much contemporary constitutional scholarship.<sup>6</sup> Rather, Professor Levinson offers a series of musings and meditations on interrelated aspects of constitutional faith. The book thus reads less like a conventional exercise in constitutional theory and more like a collection of sermons on various questions raised by the book's terse yet rich title. And as a sermon, each chapter has considerable virtue. Levinson is always sincere<sup>7</sup> and at times soul-bearing, erudite in the wide range of thinkers (both within law and beyond) whom he quotes and discusses, and elegant in his imagery and prose.

Chapter one begins with a dextrous weaving of quotations suggesting

the key role that the Constitution [has] played within the structure of the American "civil religion," that web of understandings, myths, symbols, and documents out of which would be woven interpretive narratives both placing within history and normatively justifying the new American community coming into being following the travails of the Revolution.<sup>8</sup>

Levinson argues that most observers have missed much of the significance of the phenomenon of "civil religion" by emphasizing only the Constitution's "integrative function"<sup>9</sup>—its ability as a symbol to "supply an overarching sense of unity even in a society otherwise riddled with

3. See p. 10.

4. P. 4.

5. P. 6.

6. See, e.g., C. BLACK, *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* (1960); J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* (1980); J. ELY, *DEMOCRACY AND DISTRICT: A THEORY OF JUDICIAL REVIEW* (1980).

7. Cf. p. 172 ("Sincerity—or intellectual honesty—may be a *sine qua non* of professing . . .").

8. P. 10. Levinson compares Jefferson's criticism of those who show "sanctimonious reverence" for the Constitution, see p. 9 (quoting Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), reprinted in 10 *WRITINGS OF THOMAS JEFFERSON* 37, 42 (P. Ford ed. 1899)), with Madison's view that "great charters" of government are worthy objects of reverence, see p. 10 (quoting Madison, *Charters*, *Nat'l Gazette*, Jan. 19, 1792, at 94, col. 4, reprinted in 14 *THE PAPERS OF JAMES MADISON* 192 (R. Rutland ed. 1983)).

9. P. 15. Levinson credits Rousseau with this theory. P. 15; see J. ROUSSEAU, *THE SOCIAL CONTRACT* 176-87 (M. Cranston trans. 1968) (1762).

conflict.’”<sup>10</sup> For Levinson, this approach “overlooks the fact that religion, especially over the past 500 years, has served much more as a source of deep cleavage than of unity.”<sup>11</sup> Indeed, Levinson argues that traditional sources of religious schism have parallels in “many classic constitutional controversies.”<sup>12</sup> To illustrate this insight, he sets out a stylized dichotomy between “Protestantism” and “Catholicism” in Western religious thought, a dichotomy reflected in the different answers that these two traditions have proffered to two fundamental questions. First, *what is the source of authoritative doctrine*—the text of scripture alone, or the text as glossed and supplemented by an unwritten tradition carrying at least equal weight?<sup>13</sup> Second, *who can authoritatively interpret doctrine*—the entire body of believers acting individually or in nonhierarchical communities, or a special hierarchical entity (such as the papacy or curia) claiming unique interpretive competence?<sup>14</sup> Along both dimensions, “Protestants” tend to affirm the first alternative; “Catholics,” the second.<sup>15</sup> These religious positions, Levinson argues, map onto long-standing debates about the Constitution. Pure constitutional “Protestants” (like former Attorney General Edwin Meese) emphasize the supremacy of constitutional text over precedent and evolving tradition; they also challenge the notion that the Supreme Court is the exclusive and ultimate interpreter of constitutional meaning.<sup>16</sup> Pure constitutional “Catholics” (like the younger Justice Harlan) tend to disagree along both dimensions.<sup>17</sup> To make matters even more complex and disintegrating, one can coherently be a “Protestant” about one question and a “Catholic” about the other. Indeed, Levinson identifies himself as a “Catholic” on the source of legal authority but a “Protestant” on the locus of interpretive authority.<sup>18</sup> Yet Levinson does not attempt to defend in any depth this (or any other) combination against its competitors; indeed, he suggests that debate about such matters is Sisyphean:

It is unlikely, moreover, that any of the participants in the debates about constitutional theory are going to have their minds

10. P. 15 (quoting R. WILLIAMS, *AMERICAN SOCIETY: A SOCIOLOGICAL INTERPRETATION* 559 (1951)).

11. Pp. 15-16.

12. P. 17.

13. See pp. 18-21.

14. See pp. 23, 29.

15. See pp. 18, 29.

16. See pp. 22, 33, 39-42; Levinson, *Looking at the Constitution: Could Meese Be Right This Time?*, 243 *NATION* 689, 706-07 (1986); Meese, *The Law of the Constitution*, 61 *TUL. L. REV.* 979, 983 (1987); Devins, *The Constitution Between Friends* (Book Review), 67 *TEXAS L. REV.* 213, 213-14 (1988).

17. Pp. 34-35.

18. P. 209 n.161.

changed by reading anything by a person of another sect, any more than Baptist theologians are likely to convert to Catholicism when presented with a "refutation" of their position.<sup>19</sup>

The conclusion Levinson derives from all this is sobering:

[T]he ability of "the Constitution" to provide the unity so desperately sought as a preventive against disorder depends on the resolution of the same issues that split Judaism, Christianity, Islam, and, indeed, all other religions that have texts as a central part of their structure. . . . But sophisticated legal theorists agree on none of these premises. We are not sure of what "the Constitution" consists, or how it is to be interpreted, or who is to be the authoritative interpreter.<sup>20</sup>

In Chapter two, Levinson analyzes the moral dimension of "constitutional faith." Are the commands of the Constitution necessarily moral? How could this be so, unless we abandon morality as an independent substantive ideal and simply say that *because* the Constitution commands, or permits, *X*, *X* is therefore (by definition) moral? And if we reject this approach and acknowledge that a command might be simultaneously constitutional and immoral, why should we put our faith in, and pledge our allegiance to, the Constitution?<sup>21</sup> As Levinson points out:

[T]his problem posed by American civil religion and its key text—the Constitution—has its analogue in traditional religion. It can variously be described as the problem of theodicy or of nominalism; in both cases, the crucial issue concerns the relationship, if any, between the stipulated sovereignty of God and one's definition of goodness, i.e., that which is worthy of moral respect.<sup>22</sup>

For Levinson, the very idea of popular sovereignty underlying the Constitution decisively severed law from morality:

"[C]onsent of the governed" shifted from being a consensual recognition of *a priori* truths to being a more *self-validating* procedure . . . . In the past, law was legitimate because it was based on moral principles; in the future, law would receive its legitimacy from being the incarnation of the focused energies of the body politic.

The transition of the basis of law from principle to will has the

19. P. 52. Levinson also notes elsewhere:

Because questions of Constitution-identity are metatheoretical . . . all suggested answers inevitably are circular. There is simply no way of referring to "the Constitution" for a criterion of *what* "the Constitution" is. Whatever the process by which understandings of concepts like "the Constitution" emerge, it is doubtful that logical argumentation plays a crucial role.

Pp. 36-37.

20. P. 51.

21. See pp. 58-60.

22. P. 59.

effect of analytically separating law from morality . . . .<sup>23</sup>

Levinson further exposes the tension between constitutional law and morality by reminding the reader of the myriad ways in which the original Constitution (at least, as conventionally interpreted) supported a brutal regime of human slavery.<sup>24</sup> Levinson responds to this tension by advocating a principle of interpretive charity: whenever possible, judges should construe the Constitution so as to render it a more morally attractive document (presumably in the judges' eyes).<sup>25</sup> In the course of this argument, Levinson attacks Judge Robert Bork's jurisprudence of "original intent" as violating this principle of charity in its unwillingness to bend the law through creative interpretation to reach a morally superior result.<sup>26</sup> Yet Levinson concludes by acknowledging that even the principle of interpretive charity only shrinks, but does not eliminate, the analytic gulf between law and morality. Once again, his concluding words are sobering:

[N]ot even Ronald Dworkin insists that the Constitution can *always* be plausibly interpreted in an attractive manner . . . . [S]o long as one rejects a complete identity between the requirements of one's morality and those of the Constitution, it remains ill-advised to give too much respect to the Constitution or to promote automatic respect by others.<sup>27</sup>

Chapter three examines the role of creedal affirmation within faith structures. Should community membership depend primarily on descent or, alternatively, on consent and assent? Some religions, such as Judaism, tend to emphasize the former—one is *born* a Jew—while others, such as Christianity, focus more centrally on the latter—one *becomes* a Christian by conversion and affirmation of belief.<sup>28</sup> The Constitution partakes of both models in defining the American community: the fourteenth amendment establishes descent-like birthright citizenship for all those born "in the United States,"<sup>29</sup> and naturalization laws permit outsiders to convert to American citizenship by, among other things, explicitly affirming their allegiance to the Constitution via loyalty oaths.<sup>30</sup> This situation poses some puzzles for Levinson. Given the centrality of

23. P. 64.

24. See pp. 65-68.

25. See p. 88.

26. See pp. 77, 81, 86. For an explanation of Bork's theory of constitutional interpretation, see Bork, *Tradition and Morality in Constitutional Law*, in *VIEWS FROM THE BENCH: THE JUDICIARY AND CONSTITUTIONAL POLITICS* 166, 171 (M. Cannon & D. O'Brien eds. 1985).

27. P. 88.

28. See pp. 90-91. Levinson notes that conversion is far less central to Judaism, which has no propositional analogue to the Apostle's Creed. P. 91.

29. See U.S. CONST. amend. XIV, § 1.

30. See 8 U.S.C. § 1448 (1982); pp. 113-14.

notions of consent and social contract in America, why should birth alone confer full membership in the American political community?<sup>31</sup> In a society lacking a strong ethnic and cultural homogeneity—like that enjoyed by Jews (a religious community) or the French (a political community)—does mere birth in a common territory establish a sufficiently strong set of ties to hold Americans together? Put another way, if it is appropriate to require a naturalized citizen to take an oath in order to vote, why is it not equally appropriate to impose the same requirement on natives—at least if they want to vote, and thus become full members of the American political community?<sup>32</sup> Loyalty oaths need not necessarily be viewed as illiberal and oppressive, Levinson argues; indeed, they help give explicit content to liberal notions of the “consent of the governed.”<sup>33</sup> Levinson goes on to remind the reader that oaths have played important roles in constituting both religious communities and more intimate ones—such as the marriage community constituted by wedding vows. Yet this very analogy only raises further complications, as Levinson notes at the chapter’s end:

All political states, then, face the problem of multiple loyalties of their citizenry; this is the price of a pluralist culture. Sometimes the competing loyalty is to other political entities; on other occasions, though, the competitors are other institutions within the society, whether family or religious community. Generally speaking, we do not treat these competitors equally. Thus we presumably find understandable—and endorse—the demand made by the United States that its new citizens repudiate their previous primary loyalties to other countries. Yet I am quite sure that most of us would condemn as totalitarian an explicit requirement by the United States (or any other country) that one affirm primary loyalty to *it* over the competing loyalties of family and religion. I believe that there is more of a problem here than the traditional learning allows.<sup>34</sup>

Chapter four focuses on the specific content of loyalty oaths that have been required of naturalized citizens. Once again, a powerful analogy to religion suggests itself: should the measure of one’s fidelity to the Constitution be one’s inward state (“inner faith”) or outward behavior (“good works”)?<sup>35</sup> And if we focus on the latter, how can we justify violations of the law by the greatest figures in the pantheon of American constitutionalism—the Federalist fathers at Philadelphia and Abraham

31. See p. 104.

32. See pp. 105-06.

33. See pp. 100-01.

34. P. 119.

35. See pp. 127-35.

Lincoln, the father of the "second Constitution" ushered in after the Civil War?<sup>36</sup> For, according to Levinson, Father Madison and Father Abraham engaged in much activity that was obviously illegal at the time.<sup>37</sup> The ratification of the Constitution was, says Levinson, " 'plainly an extra-legal' " act in violation of the extant Articles of Confederation,<sup>38</sup> which served as, "in effect, our first national constitution."<sup>39</sup> Similarly, Levinson suggests that Lincoln's policy of military arrests violated the most plausible reading of the constitutional limitation on the suspension of habeas corpus<sup>40</sup> and that his *Emancipation Proclamation* was similarly constitutionally suspect.<sup>41</sup> Do these acts mean that these men lacked the requisite loyalty and fidelity to the constitutions they inherited, even as they worked to reshape our fundamental law? Moreover, does not the very possibility of the *lawful* reshaping of our fundamental law—through the provisions of article V—further complicate the notion of loyalty to the document? Can one be considered truly "faithful" to the document if one abhors virtually all its substantive rules but seeks to change these rules only through the procedures of article V itself? This last question raises a fundamental dissimilarity between constitutional law and religion, which Levinson notes in passing:

One of the vital differences between "constitutional faith" and more traditional religious faith is precisely the explicitly authorized amendment process in the former. Most major Western religions have resisted theories of "continuing revelation" that might in effect legitimize strong "amendment" of divine commandment by persons claiming direct communication from God.<sup>42</sup>

In the final two chapters, Levinson brings the question of constitu-

36. See pp. 129-30.

37. Pp. 131, 141.

38. P. 131 (quoting Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1017 n.6 (1984)). But see Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1446-48 (1987) (pointing out that it was the Articles' status as a "fallen treaty" that justified the Philadelphia Convention's proclamation that its new Constitution would take effect "among any nine states that chose to ratify it—notwithstanding the Articles' clear requirement that all amendments to it be unanimously adopted"); Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1048-49 (1988) [hereinafter Amar, *Philadelphia Revisited*] (observing that the Articles were "merely a treaty among thirteen otherwise free and independent nations").

39. P. 130. But see Amar, *Of Sovereignty and Federalism*, *supra* note 38, at 1446-48, 1455 (arguing that the Articles of Confederation were not a constitution but a confederacy or "firm league of friendship" into which the various states entered).

40. See U.S. CONST. art. I, § 9; pp. 132-33.

41. See p. 141. These propositions are quite debatable, yet Levinson nowhere defends them in any detail. Here, as elsewhere, he seems content to rely on the primary analyses of other scholars. Given Levinson's general fondness for broad claims about indeterminacy and his belief that conventions of legal argument are generally contradictory, see *infra* notes 94-100 and accompanying text, it is unclear on what ground he believes Lincoln's actions in these two instances violated the "most plausible" reading of the Constitution.

42. P. 152.

tional faith down to a personal level. In Chapter five, he asks what, if any, faith in law he should be required to "profess" in order to be eligible to be a "professor" of law. Once again, Levinson finds an analogy between law and religion useful in placing issues in context: for Levinson, Dean Paul Carrington's recent attack on Critical Legal Studies scholars and other "nihilists" teaching in law schools<sup>43</sup> poses the question of whether law schools should be more like divinity schools or religious studies departments.<sup>44</sup> If the former, then perhaps would-be "professors" could legitimately be required to "profess" a "belief" in the law before they should be allowed access to professional students who have made at least a tentative commitment to live a life of law. (Would not a divinity school, Levinson asks, be within its rights to protect its students from an atheist who professed disbelief in God?<sup>45</sup>) If, on the other hand, the more appropriate model for law schools is a religious studies department, as Levinson argues (albeit with reservations), it becomes much easier to dismiss Carrington with a talismanic invocation of "academic freedom."<sup>46</sup>

The concluding chapter is also deeply personal. Levinson shares his inner struggle in deciding whether to add his own signature to the Constitution, as invited by the National Park Service's bicentennial exhibit at Philadelphia.<sup>47</sup> Nothing external turns on this choice—there is no outside pressure to sign in order to obtain some desired benefit, such as a passport or the right to vote. Yet the lack of external pressure only sharpens the internal struggle in Levinson's own mind and soul. The image of Levinson, poised with pen in hand, and yet unsure of his best course, is dramatic. To sign or not to sign, that is the question. His ultimate decision to sign is perhaps less important than the reasons he offers for the act—namely, that signing the document does not commit him to very much at all:

The Constitution is a linguistic system, what some among us might call a discourse. It has helped to generate a uniquely American form of political rhetoric that allows one to grapple with every important political issue imaginable . . . The fact that its teachings are "indeterminate" is quite beside the point; so is any system of language.<sup>48</sup>

Thus, for Levinson, the Constitution is

43. See Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984).

44. See pp. 161-62.

45. See pp. 161-62.

46. See pp. 170-71.

47. See pp. 180, 191-94.

48. P. 191.



less a series of propositional utterances than a commitment to taking political conversation seriously. I would want to distinguish this from an entirely "Article V" view of the Constitution, though, because I do indeed believe that the Constitution is best understood as supportive of such conversations and requiring a government committed to their maintenance. Moreover, as suggested in Chapter Two, what makes my faith assertion only a limited one is the recognition that even my "best" Constitution might at times come into conflict with what I regard as my most important moral commitments; under such circumstances, it would be the Constitution that (I hope) would give way.<sup>49</sup>

## II. The Meditations of My Heart

There is much in Professor Levinson's book to meditate on, for he raises many of the deepest questions confronting us today—as lawyers, as scholars, as religious (non)believers, as Americans, and, most generally, as people struggling in this world for meaning and peace. Levinson's insights into these issues are myriad, and the connections he draws among different sets of issues are elegant and thought-provoking. Especially impressive is the way he uses his knowledge of large bodies of thought outside law, narrowly defined (theology, moral philosophy, literary theory) to cast new light on legal questions.

Yet there is, it seems to me, a real price to be paid for all this. In the process of using outside disciplines to illuminate certain legal issues, Levinson obscures other aspects of these topics—aspects well illuminated by more conventional legal analysis. Much is surely gained, but just as surely, something is lost, something distinctively legal. Although it is hard to pin down precisely what that something is, two of the book's omissions are especially striking. First, the book fails to take seriously enough the legal process tradition that illuminates the interplay between substantive rules governing primary conduct and process-based rules allocating power among different decision makers to create and interpret those substantive rules.<sup>50</sup> Second, it does not engage fully the myriad conventions of legal argument that help to generate fairly determinate legal answers to a considerable range of constitutional issues. To the extent Levinson does commit himself to certain positions in the book—he does offer some tentative answers to the many questions he poses—these two related omissions call those positions into doubt.

Consider, for example, Levinson's attack on Judge Bork's philoso-

49. P. 193.

50. For a more elaborate description of this legal process tradition, see Amar, *Law Story*, 102 HARV. L. REV. 688 (1989).

phy of constitutional interpretation.<sup>51</sup> Although I share Professor Levinson's unease with many of Bork's substantive positions, Levinson's broad-gauged attack on a jurisprudence of strict construction<sup>52</sup> rests in part on an analytic cheat that blurs critical issues of legal process. To illustrate the silliness of "literal"<sup>53</sup> and mechanistic modes of judicial interpretation, Levinson conjures up a hypothetical.<sup>54</sup> A mother, at time  $T(1)$ , gives a babysitter express written instructions about what to do at some future time  $T(3)$ . Those instructions are emphatic that "*under no circumstances*" is the babysitter to deviate from them at  $T(3)$ .<sup>55</sup> Between  $T(1)$  and  $T(3)$ , some extraordinary event, wholly unexpected by the mother, transpires at time  $T(2)$ . The event creates grave doubt whether the mother (who cannot be reached) would continue to want her literal instructions to be mechanically obeyed. Under these circumstances, Levinson asks, would it not beg the question for the babysitter to assume that any deviations from the strict words would violate the instructions, and the true "intention" of the mother behind those instructions?<sup>56</sup>

Levinson's illustration of the difference between a rule's letter and its spirit—a difference often sharpened by a wholly extraordinary and unexpected event—is well taken.<sup>57</sup> But does not Levinson's hypothetical beg some obvious questions as well? Is not at least one critical question that of *who* should decide whether the intervening event justifies disregarding the literal words of the instructions? In Levinson's hypothetical, the answer is obviously the babysitter, because the mother presumably cannot be reached to ask her whether she continues to desire that the instructions be followed literally, even in light of the event at  $T(2)$ . But any easy, implied analogy between the hypothetical mother and the founding "fathers," on the one hand, and between the hypothetical babysitter and judicial "benchsitters," on the other, breaks down in a number of ways. To begin with, as Levinson himself notes in passing elsewhere in his book, the canon of constitutional text is not closed; new textual instructions can be added and the specific wording of old texts altered

51. See pp. 80-87. See generally Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971) [hereinafter Bork, *Neutral Principles*] ("The judge must stick close to the text and the history, and their fair implications, and not construct new rights."); Bork, *supra* note 26, at 171-72 (asserting that a judge's sole task "is to translate the framer's or the legislator's morality into a rule to cover unforeseen circumstances").

52. See pp. 83-84.

53. See pp. 83-84.

54. Pp. 81-82.

55. P. 82.

56. See p. 82.

57. See Note, *Plastics: Unger and Ackerman on Transformation*, 98 YALE L.J. — (forthcoming 1989).

through explicit amendment procedures.<sup>58</sup> If an age-old and unchangeable religious text is to be kept vital and meaningful in a new and ever-changing world, creative interpretation is perhaps indispensable to avoid ossification. If an unreachable mother's true purposes are to be respected most deeply, a babysitter may well have to stretch the mother's words quite far, but loose construction by judges is not similarly indispensable to maintain the Constitution as a living document. Even if judges generally interpreted its words strictly, the document could be enlivened and kept up-to-date by formal textual amendment. Yet Levinson never considers whether the possibility of formal amendment of a text might affect the optimal point on the continuum between strict and loose construction. Of course, the best answer may well be that the possibility of amendment should not affect one's interpretive strategy, but Levinson never even asks the question. Put another way, Levinson never asks whether a different result should follow if the mother directed the babysitter to follow her instructions "in all cases" at *T(3)*, unless instructed otherwise by the mother by phone, and the mother—although aware of the intervening event at *T(2)*—nevertheless declined to phone. Given that in constitutional law the source of all textual instructions—the people—can be reached at all times and are free to alter the wording of their instructions via amendment,<sup>59</sup> Levinson may have unfairly rigged his chosen hypothetical in favor of loose judicial interpretation.

Further complications arise when we recognize that there is more than one constitutional "babysitter" at *T(3)*. Even aside from the possibility of direct recourse to the people through article V or some other mode of formal amendment,<sup>60</sup> which branch of government should decide whether the event at *T(2)* is such that true fidelity to the instructions issued by "We the People" requires deviations from the strict words We laid down at *T(1)*? Bork bases his argument for judicial restraint in part on his claim that courts should generally defer to the decisions of legislatures on these matters. He explicitly roots this view, in turn, in process-based concerns. Legislators, Bork argues, hold their offices under more accountable and democratic (that is, majoritarian) processes of selection and retention than do judges.<sup>61</sup>

Once again, by invoking Judge Bork's process-based arguments, I

58. See p. 152.

59. Indeed, constitutional amendments may be easier to accomplish than commentators have generally recognized. See Ackerman, *supra* note 38, at 1051-70. See generally Amar, *Philadelphia Revisited*, *supra* note 38.

60. See generally Amar, *Philadelphia Revisited*, *supra* note 38 (discussing the formal mode of popular amendment outside article V).

61. See Bork, *Neutral Principles*, *supra* note 51, at 4.

do not mean to embrace them. As I have argued elsewhere, on legal process grounds, legislatures are less democratic, and courts more so, than Bork acknowledges.<sup>62</sup> Moreover, deference to legislatures is not equivalent to strict fidelity to the words of the Constitution, as Bork seems to imply. Indeed, in some situations in which legislative action does rather plainly violate constitutional limits, legislative deference and originalism pull in opposite directions; judges sometimes can uphold the actions of the more "democratic" (according to Bork) legislature only by creatively stretching the constitutional text in favor of the legislature. Judicial restraint toward the legislature is thus different from—and often at odds with—judicial restraint toward the framers. My quarrel with Professor Levinson is thus not that he disagrees with Judge Bork—so do I—but that in doing so, he ignores many of the key legal process issues raised by lawyers like Bork and William Rehnquist.<sup>63</sup>

For Levinson, "[c]onstitutionalism, like religion, represents an attempt to render an otherwise chaotic order coherent, to supply a set of beliefs capable of channeling our conduct."<sup>64</sup> For legal process analysts, however, the Constitution—unlike most religious texts—also devotes great attention and detail to the structure of decision-making processes—to the *constitution* of institutions and the demarcation of their authority. To understand the law fully, we must not focus simply on substantive norms—as Levinson too often does—but also on the interplay between those norms and the procedures that create and implement them. For example, Levinson invokes the Constitution's preamble no less than five times,<sup>65</sup> but on every occasion he sees only a direct affirmation of substantive values, as embodied in words such as "liberty" and "justice." But many of the preamble's other words—most notably its first seven and its last seven—have large legal process implications concerning who can create and amend substantive values, and how.<sup>66</sup> These words underscore a theory of popular sovereignty that, as I have argued elsewhere, has profound ramifications for a wide range of traditional constitutional issues of federalism, separation of powers, and constitutional amendment.<sup>67</sup>

Levinson argues that popular sovereignty "has the effect of analyti-

62. See Amar, *Philadelphia Revisited*, *supra* note 38, at 1076-87.

63. See generally Rehnquist, *The Notion of a Living Constitution*, 54 TEXAS L. REV. 693 (1976) (presenting a constitutional theory similar to that of Bork).

64. P. 36.

65. See pp. 4, 75, 78, 130, 180.

66. See Amar, *Of Sovereignty and Federalism*, *supra* note 38, at 1450-51, 1455-56.

67. See *id.* at 1429-66; Amar, *Philadelphia Revisited*, *supra* note 38, at 1055-60.

cally separating law from morality,"<sup>68</sup> but this claim once again betrays his preoccupation with substantive results and his neglect of legal process norms. Indeed, he elsewhere concedes that popular sovereignty does not eliminate morality from law; it simply refocuses attention from the morality of substantive rules to the morality of procedures under which those rules emerge.<sup>69</sup> A principle of popular sovereignty is not, Levinson's intimations notwithstanding, functionally equivalent to an amoral Holmesian celebration of "dominant power."<sup>70</sup> First, popular sovereignty and its corollary ideal of one person, one vote are themselves rooted in moral principles, such as equality of all citizens (hence the rule that no vote should count for more than any other) and the nonentrenchment of the status quo (hence the refusal to privilege it through supermajority requirements).<sup>71</sup> Second, the "right" of popular sovereignty need not always coincide with the "might" of dominant power. As James Madison reminded his readers in *The Federalist* No. 43, a minority of voters could have a preponderance of power—economic power, military power, and support from outside nations or people outside the polity (including domestic nonvoters).<sup>72</sup> Majority rule is thus a moral principle of right designed to constrain might.

Moreover, the right of a majority of the people, acting in convention, to alter or abolish their constitution is perhaps the most important value (combining substance and process) embodied in the entire Constitution. This renders extremely problematic Levinson's characterization of the constitutional status of majority rule:

Majority rule is simply not the same thing as constitutionalism, as that concept was classically defined. One cannot understand the notion of a constitution, at least prior to twentieth-century thought, without including its role of placing limits on the ability of majorities (or other rulers) to do whatever they wish in regard to minorities who lose out in political struggles.<sup>73</sup>

Levinson states later in the book that "constitutionalism is an important limit to the value of majority rule precisely because it incarnates a value hierarchically superior to majority rule."<sup>74</sup> If by "majority rule" Levinson means simply rule by majorities of ordinary legislatures, I concur in his judgment, though not in his wording. Ordinary legislatures are

68. P. 64.

69. P. 62.

70. But see pp. 64-65 ("[A]doption of what might be termed 'robust positivism,' where putatively unjust law is privileged over the demands of justice, is not something done lightly.").

71. See Amar, *Philadelphia Revisited*, *supra* note 38, at 1044 n.1, 1072-76.

72. See *THE FEDERALIST* No. 43, at 276-77 (J. Madison) (C. Rossiter ed. 1961).

73. P. 70.

74. P. 150.

mere agents of the people, and are limited in their power by restrictions laid down by their principal (the people) in the Constitution itself.<sup>75</sup> But if Levinson believes that universal ideas of constitutionalism before the twentieth century necessarily imposed sweeping restrictions on a majority of the people themselves, acting directly through constitutional conventions,<sup>76</sup> his undocumented claims are wildly overstated. An

75. See p. 150.

76. After ratification of the Constitution, the relevant sovereign people was "the People of the United States, as a whole," and not the people of each state. Amar, *Of Sovereignty and Federalism*, *supra* note 38, at 1451-62. Thus, the attempt of southern states to secede by a mere majority vote of the people of each seceding state was unconstitutional. *Id.* at 1462 & n.162, 1499-1500; Amar, *Philadelphia Revisited*, *supra* note 38, at 1062 n.69, 1076.

Levinson at times seems agnostic on the constitutionality of secession, *see* p. 28, and at other times appears to go even further by blaming Lincoln for the Civil War, and even implying that Lincoln acted illegally in his refusal (backed by the executive power of the United States) to recognize the lawfulness of unilateral secession, *see* p. 139. Here, too, Levinson's single-minded focus on "civil religion" analogies seems to have led him astray. From the civil religion perspective, secession might seem closely analogous to religious separatism and schism—a group of "believers" breaks away from an old "church" to found a new one. But this analogy collapses vital differences between *emigration* and *secession*—differences once again illuminated by the legal process perspective. Lincoln did not challenge the undeniable right of those disgruntled elements in the South to leave and found their own "church." Instead, he challenged their right to bind local minorities, and to assert sovereignty over physical territory within the United States, without the consent of a national majority. The issue was not whether the "sacred ties" of nationhood could be broken, but whether secession required a national rather than a local majority—whether "dissolution" of the "wedding" of states to each other and to the Constitution in the 1780s could occur unilaterally or required mutual consent. Once again, the key issue, as Lincoln was at pains to emphasize in his brilliant first inaugural address, is *who* decides—a national majority or a national minority? See First Inaugural Address by President Abraham Lincoln (Mar. 4, 1861), reprinted in ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 579, 582-83 (R. Basler ed. 1946) [hereinafter Lincoln's Inaugural Address]. (And, of course, if each state could lawfully secede, this fact would dramatically affect the balance of bargaining power between nation and state on ordinary issues of day-to-day politics within the union.) Moreover, territoriality introduces further differences between secession on the one hand and religious separatism or marital separation on the other. As Lincoln noted so eloquently, North and South could not physically separate. *See id.* at 582-83. The Constitution itself recognizes this inescapable territoriality in proclaiming itself the "supreme Law of the Land." U.S. CONST. art. VI, cl. 2 (emphasis added). Regional disagreements were bound to be many. For example, who would populate and control the resource-rich West? Who would control the right to navigate the Mississippi River, the commercial lifeline of the entire region between the Appalachians and the Rockies? Such disagreements could be mediated only by law within a common Constitution or by force outside one:

Physically speaking, we cannot separate. We cannot remove our respective sections from each other, nor build an impassable wall between them. A husband and wife may be divorced, and go out of the presence, and beyond the reach of each other; but the different parts of our country cannot do this. They cannot but remain face to face; and intercourse, either amicable or hostile, must continue between them. Is it possible, then, to make that intercourse more advantageous or more satisfactory, *after* separation than *before*? Can aliens make treaties easier than friends can make laws? Can treaties be more faithfully enforced between aliens than laws can among friends? Suppose you go to war, you cannot fight always; and when, after much loss on both sides, and no gain on either, you cease fighting, the identical old questions, as to terms of intercourse, are again upon you.

Lincoln's Inaugural Address, *supra*, at 586.

Professor Levinson's expressed sentiments about secession are all the more unfortunate because of the possibility of their misuse by a perverse "civil religion" that still seems to retain some vitality in Texas—a civil religion that celebrates the "glorious cause" of the Confederate states, that erects monuments to that cause, that spawns Confederate flag-waving, and that encourages social events

important—indeed, I would argue the dominant—strand of American constitutionalism in the late 1780s rooted constitutionalism in principles of popular majority rule.<sup>77</sup> The moral foundation for this vision of popular sovereignty is captured in a classical phrase that Levinson ignores but that in fact harmonizes with his general interest in “civil religion”: *Vox populi, vox Dei* (“The voice of the people is the voice of God”).

When we move from the issues raised by popular amendment of the Constitution to the issues raised by the allocation of power among ordinary government agents under the Constitution, a further disanalogy between the Constitution and most religious texts emerges. Once again, the

such as “Confederate balls.” Indeed, I was originally moved to think and write about secession by a conversation that I had with Professor Levinson in the spring of 1986 in Austin, Texas while standing literally in the shadow of a monument to the Confederate war dead (erected in 1901, the heyday of Jim Crow in Texas) in front of the Texas State Capitol. Not only do I find the explicit textual message of this monument—that Texas’s right of unilateral secession was a “state right[ ] guaranteed under the Constitution,” which was simply a “federal compact”—wrong as a matter of constitutional law, I find its implicit message troubling as a matter of contemporary policy. Confederate symbols—flags, monuments, and so on—all too easily exclude large numbers of citizens, most notably blacks. The metaphoric exclusion implicit in these symbols is made concrete in the physical exclusion associated with (almost invariably) all-white affairs such as Confederate balls. If unifying symbols are needed, why should we pick symbols that may be hurtful to so many valued members of the community? Certainly, the stars and bars need not be the preferred symbol of today’s South any more than a swastika should be the preferred symbol of today’s Germany. (Admittedly, the comparison may be overstated, yet both symbols have appeared on many flags in anti-civil rights protests over the last three decades.) Once again, we can ask a useful legal process question in thinking about icons of civil religion, such as flags: whose South should we be saluting—the South of unreconstructed whites or a new South that seeks to include blacks on equal terms even as the region itself seeks to be included on equal terms within the nation?

77. See, e.g., Virginia Declaration of Rights art. 3 (1776), reprinted in R. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS, 1776-1791* app. A at 231 (1955) (“[W]hensoever any Government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable, and indefensible right, to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.”); Virginia Report of 1799-1800, reprinted in *THE VIRGINIA REPORT OF 1799-1800 TOGETHER WITH THE VIRGINIA RESOLUTIONS OF DECEMBER 21, 1798*, at 189, 196 (L. Levy ed. 1970) (“The authority of constitutions over governments, and of the sovereignty of the people over constitutions, are truths which are at all times necessary to be kept in mind . . . .”); 2 *DEBATES ON THE FEDERAL CONSTITUTION* 432 (J. Elliot 2d ed. 1907) (“As our constitutions are superior to our legislatures, so the people are superior to our constitutions. Indeed, the superiority, in this last instance, is much greater; for the people possess over our constitutions control in *act* as well as right.” (statement of James Wilson on November 20, 1787, at Pennsylvania ratifying convention)); *THE FEDERALIST* No. 39, at 246 (J. Madison) (C. Rossiter ed. 1961) (“[A] majority of every national society [is] competent at all times, to alter or abolish its established government.”); 2 *RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 92 (M. Farrand ed. 1911) (“[I]n like manner . . . the Constitution of a particular State may be altered by a majority of the people of the State.” (statement of Gouverneur Morris on July 23, 1787, at Philadelphia convention)); 1 J. STORY, *COMMENTARIES ON THE CONSTITUTION* § 327, at 297 (Boston 1833) (“[T]he majority has at all times, a right to govern the minority . . . .”); *id.* § 337, at 306 (“[E]very individual has surrendered to the majority of the society the right permanently to control, and direct the operations of government therein.”); Roane, *Hampden Essay*, *Richmond Enquirer*, June 18, 1819, reprinted in *JOHN MARSHALL’S DEFENSE OF McCULLOCH V. MARYLAND* 125, 130 (G. Gunther ed. 1969) (“The people only are supreme. The Constitution is subordinate to them . . . .”); Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), reprinted in 4 *WRITINGS OF THOMAS JEFFERSON* 473, 479 (P. Ford ed. 1899) (“[I]t is my principle that the will of the majority should always prevail.”).

legal process tradition illuminates this dissimilarity: unlike most religious texts, the Constitution devotes considerable attention to structuring institutions and defining their roles. The Gospel texts give little explicit guidance on how the community of believers should govern themselves institutionally—the word “church” appears only twice, both times in the Gospel according to Saint Matthew<sup>78</sup>—whereas the bulk of the Constitution’s text focuses on these concerns. How are government officials to be chosen? For how long? By whom? With what possibility of renewal? How are they to be paid? By whom? What powers can they exercise? How are their decisions to be aggregated and coordinated with those of other decision makers in the system? Indeed, precisely because so many substantive norms in the Constitution are—when considered in an institutional vacuum—so open and indeterminate (as Levinson is at pains to remind the reader), the Constitution’s structural and procedural rules are often considerably more determinate in specifying *who* is to resolve *which* substantive issue *when* and subject to *what* kind of override by *whom*.<sup>79</sup>

Levinson’s view that even those legal process questions are wildly indeterminate appears most strikingly in his discussion of “Protestantism” versus “Catholicism” concerning institutional interpretive competence.<sup>80</sup> If there are indeed two widely divergent theories of interpretive competence within constitutional discourse—as Levinson claims—then his faith in indeterminacy is perhaps confirmed. But Levinson is able to suggest such a wide divergence only by (once again) blurring key legal process distinctions. When legislators or executives give effect to their own understandings of the Constitution by thwarting laws they deem unconstitutional, even though they know the Supreme Court would uphold those laws, the situation is very different from legislative or executive disregard of a holding by the Supreme Court that a law is unconstitutional. In effect, the Constitution structures the procedures of the federal government to help implement its substantive restrictions on federal power by generally giving each branch of the federal government a constitutional veto on any law it deems unconstitutional.<sup>81</sup> None of the constitutional “Catholics” Levinson invokes would, I think, deny the ba-

78. See Kee, *The Gospel According to Matthew*, in *THE INTERPRETER’S ONE-VOLUME COMMENTARY ON THE BIBLE* 609, 629 (C. Laymon ed. 1971) (noting that the Gospel texts mention “church” only twice, in *Matthew* 16:18 and *id.* 18:17).

79. See Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L. REV. 205, 207 & n.7, 208, 258 & n.169 (1985); Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L.J. 821, 865-72 (1985).

80. See pp. 29, 35-36.

81. See Amar, *supra* note 79, at 222 & n.67, 223 & nn.68-69; Amar, *Of Sovereignty and Federalism*, *supra* note 38, at 1504.



sic point that a conscientious legislator can vote against a bill she deems unconstitutional, even if she knows the Court would uphold it. Few if any of the constitutional "Protestants" that Levinson cites would think that there is general legal authority—absent some extraordinary national emergency, perhaps—for the President to defy a Supreme Court decision holding a particular practice unconstitutional. To be sure, open and indeterminate questions remain, but the range of indeterminacy—at least among "sophisticated legal theorists"<sup>82</sup>—is considerably smaller than Levinson implies.

Nor is there as much disagreement among constitutional "Catholics" and "Protestants" about "what 'the Constitution' consists [of]" as Levinson implies.<sup>83</sup> Levinson argues that "[b]ecause questions of Constitution-identity are metatheoretical, . . . all suggested answers inevitably are circular. There is simply no way of referring to 'the Constitution' for a criterion of *what* 'the Constitution' is."<sup>84</sup> This statement strikes me as either trivial or wrong. If Levinson simply means that no text is self-defining, and that a complete understanding requires context and interpretive conventions, well and good. But if Levinson really means to grasp the deconstructive nettle and insist, Humpty Dumpty-like, that words can mean whatever he chooses them to mean,<sup>85</sup> then I part company. As a matter of either ordinary language conventions or special conventions of the legal community, it is simply not the case that all important documents in our society can be called part of the Constitution.<sup>86</sup> Unlike the words printed in Philadelphia in 1787 and the words added by subsequent amendments, the *Gettysburg Address*, Martin Luther King's speeches, and Supreme Court opinions do not even purport to locate themselves within the four corners of the Constitution. Levinson's apparent claim that they *are* part of the Constitution<sup>87</sup> seems to me to be *reductio ad absurdum*.

But am I not being excessively nominalistic here? Even if these other texts are not part of the Constitution itself, are they not fundamental and sacred texts, worthy of deep respect—part of our "civil religion"?

82. P. 51.

83. See p. 51.

84. P. 36.

85. Cf. L. CARROLL, *THE ANNOTATED ALICE: ALICE'S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING GLASS* 269 (M. Gardner ed. 1960) ("When I use a word," Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.'"), quoted in P. BREST & S. LEVINSON, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 41 n.40 (2d ed. 1983).

86. See generally Powell, *Parchment Matters: A Meditation on the Constitution as Text*, 71 IOWA L. REV. 1427 (1986).

87. See pp. 35, 184-85.

Of course they are, but that characterization does not mean that they are part of the "supreme Law of the Land."<sup>88</sup> Once again, Levinson's focus only on substance and his insistence on the civil religion analogy lead him to miss the thing that makes the Constitution itself qualitatively different from, and more legal than, these other texts: namely, the formal process of popular ratification that transformed the words from cultural symbol to supreme law.<sup>89</sup>

But is not my "Protestant" position contradicted by a rich tradition of constitutional "Catholics," as Levinson implies? No. The only "Catholic" jurist Levinson cites is the younger Justice Harlan,<sup>90</sup> and there is no indication that the great Justice thought extraconstitutional texts were part of "the Constitution" *ex proprio vigore*. Instead, he simply viewed the Constitution's text as referring to things outside itself—as do all texts.<sup>91</sup> I know of no Justice who has denied that "the ultimate touchstone of constitutionality is the Constitution itself and not what [the Justices] have said about it"<sup>92</sup> (and, a fortiori, not what anyone else has said about it or about anything else). Indeed, most Justices in this century have joined at least one opinion explicitly saying that *stare decisis* is accorded less weight in constitutional adjudication, lest judicial encrustation cover up the text itself.<sup>93</sup>

Thus far, I have argued that the radical indeterminacy on which Levinson insists<sup>94</sup> is significantly constrained by the substantial determinacy of the Constitution's rules allocating interpretive and other power. Moreover, indeterminacy is further constrained by extratextual conventions of legal argument—rhetorical categories that channel and limit the moves that can be made, within the law, upon a legal text. Yet here too, Levinson's faith in the indeterminacy thesis obliges him to break free from the constraining confines of conventional legal argument. He does so by arguing that the conventions "are hopelessly inconsistent and contradictory."<sup>95</sup> As to some issues—hard cases—it is surely true that dif-

88. U.S. CONST. art. VI, cl. 2.

89. See generally Amar, *Our Forgotten Constitution: A Bicentennial Comment*, 97 YALE L.J. 281, 286-87 (1987) (reminding that it was popular ratification that transformed the Constitution into binding law).

90. See pp. 34-35.

91. See, e.g., *Poe v. Ullman*, 367 U.S. 497, 542 (1960) (Harlan, J., dissenting) ("Due process has not been reduced to any formula; its content cannot be determined by reference to any code.").

92. *Graves v. O'Keefe*, 306 U.S. 446, 491-92 (1939) (Frankfurter, J., concurring).

93. For commentary on the extent of such sentiment among Supreme Court Justices, see *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 n.3, 409 n.4 (1932) (Brandeis, J., concurring); Blaumstein & Field, "Overruling" *Opinions in the Supreme Court*, 57 MICH. L. REV. 151, 167 (1958); Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736-37, 742-43 (1949); Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467, 467.

94. See pp. 28, 32, 125, 141, 153-54, 159, 170, 191.

95. P. 177.

ferent conventions may look in different directions. It would be silly to say that all constitutional issues are fully determinate. At some point, there is obviously a zone of indeterminacy—of doubt and good faith debate. But the issue is the relative size of that zone, and Levinson's indeterminacy claim is simply posited, not defended. I am not sure that Professor Philip Bobbitt—whose own brilliant book, *Constitutional Fate*,<sup>96</sup> Levinson cites at this point<sup>97</sup>—would agree with his colleague's conclusion as to the hopeless inconsistency of the modalities of constitutional argument. I am sure that Professor Richard Fallon—whose recent work in this area Levinson declines to engage—would claim that in a great range of everyday situations, the conventions of legal argument overdetermine the best legal answer.<sup>98</sup>

Levinson's position in this indeterminacy debate cannot be persuasively established a priori—although Levinson at times tries<sup>99</sup>—but can be demonstrated only by the actual “doing of constitutional analysis,”<sup>100</sup> of which there is too little in the book.

### III. Benediction

The great strength of Levinson's book is its interdisciplinary freshness and creativity. But, alas, therein also lies its great weakness. This need not have been so. Professor Levinson's other major book (coauthored with Paul Brest) has much of *Constitutional Faith*'s imagination, range, and insight, but is also more attentive to questions of legal process and legal conventions, as implied by its title, *Processes of Constitutional Decisionmaking*.<sup>101</sup> Yet, like that earlier work, Professor Levinson's new book is a cause for celebration and cerebration: it is a wide-ranging, sincere, and extraordinarily provocative work. It is a book well worth reading, and more than once.

May it enjoy a wide audience, both within the legal community and beyond.

Amen.

96. P. BOBBITT, *CONSTITUTIONAL FATE* (1982).

97. P. 177.

98. See generally Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).

99. See pp. 28, 125, 141, 153-54, 159, 170-78, 191.

100. P. 74.

101. P. BREST & S. LEVINSON, *supra* note 85.



# Disconnection: How Ma Bell Was Cut Off from Her Young, and What to Think About It

THE FALL OF THE BELL SYSTEM. By Peter Temin† with Louis Galambos.‡ Cambridge: Cambridge University Press, 1987. Pp. xviii, 378. \$27.95.††

Reviewed by John B. McArthur\*

We all use the phones. Most of us believe that in its years of monopoly, the American Telephone and Telegraph Company (AT&T) built the best phone system in the world. Making a call on the Bell exchange involved merely picking up the phone and dialing (or pushing)—no long waits, no dead lines, no clicks followed by disconnection, and no interminable busy signals. Our phone service was cheap, easy to get, and easy to use. The telephone became a defining characteristic of our age and transformed our conception of time and distance.

Bell was the world's largest corporation.<sup>1</sup> Bell continued to grow relentlessly, and even enlisted the government's aid to protect its monopoly position, long after most of the trusts and combinations that gave rise to the Sherman Act had lost their market dominance. Peter Temin and Louis Galambos, the authors of *The Fall of the Bell System*, describe the descent of "Ma Bell" to her position as just one of several long distance phone companies and the transformation of her children, now suddenly orphaned, into the seven regional companies that operate the local phone networks. The abandonment was complete; the local companies were forbidden by law from showing any more affection for Bell (who even had to change her name)<sup>2</sup> than for her competitors.<sup>3</sup> The demise of the old Bell raised the price of most local calls, dropped prices for long dis-

† Professor of Economics, Massachusetts Institute of Technology.

‡ Professor of History, Johns Hopkins University.

†† Hereinafter cited by page or chapter number only.

\* Partner, Susman, Godfrey & McGowan, Houston, Texas. B.A. 1975, Brown University; M.A. 1978, The University of Connecticut; J.D. 1982, The University of Texas. As is not infrequent, my thoughts have been clarified by comments from Mark Wawro.

1. See p. 10.

2. The "Bell" name is now the exclusive property of the regional companies and cannot be used by AT&T. Because most of us grew up using "Bell" as the name for the entire AT&T family, it will get to keep its name here this one last time.

3. See *United States v. Western Elec. Co.*, No. 82-0192 (D.D.C. Aug. 24, 1982) (WESTLAW, Allfeds database).

tance and business users,<sup>4</sup> created seven new Fortune 500 companies, and provided a test for how well the Sherman Act, itself almost a hundred years old, serves us in a harsh new international economy.

*The Fall of the Bell System* raises important questions about our antitrust laws and their enforcement. Did a few people, particularly Assistant Attorney General William Baxter, have too much say in restructuring the Bell System? Were our political institutions—particularly the Federal Communications Commission (FCC) and the executive branch—afraid to decide the political questions that they dumped on the courts? Was the judiciary the proper institution to decide the fate of our phone system? Did divestiture make economic sense—will it lead to lower prices and better services, or did we instead destroy the finest flower of a natural monopoly?

Important though these questions are, *The Fall of the Bell System* is often dull. The 366 pages of small-print text and footnotes wander through a maze of acronyms, corporate restructurings, and other debris of corporate life. At times the reading is little more exciting than reviewing form documents from the accounting division of a multinational corporation. An economist or antitrust scholar may find this material illuminating, but this is not a book for most casual readers. Fortunately, anyone who wants to understand the authors' basic argument without the drudgery of reading the whole book needs only to look at two chapters: Chapter six, which describes how William Baxter imposed his economic vision on the Reagan administration and on Bell, and Chapter eight, in which the authors summarize their views of this protracted divestiture.

The book has another, more serious flaw. It began when Bell Chairman Charles Brown decided he wanted to hire outsiders to chronicle the breakup. In principle, the authors were to remain formally independent: "AT&T would sponsor the study and provide access to its officers and papers, but it would not interfere with the views expressed by the author[s]."<sup>5</sup> Temin and Galambos state that "Brown wanted an outsider to write the story, albeit with information from insiders."<sup>6</sup> This arrangement undoubtedly allowed the authors to obtain an extraordinary amount of inside information and thus to provide readers a rare look into Bell's corporate back room.<sup>7</sup> But the cost seems to have been that the

4. See pp. 358-62.

5. P. xii.

6. P. xii.

7. Although Brown's impulse may reflect a charitable concern with historical accuracy, it may also simply be in vogue for the princes of industry to leave monuments to themselves. Being a footnote is probably better than not being remembered at all, even if the footnote is unfavorable.

## The Bell System

authors fail to air views critical of Bell.

For example, the authors do not give the reasons for restructuring Bell fair play. They fail to match their elaborate description of Bell's growth and destruction with an equally realistic description of the anti-trust problems that Bell caused for all would-be competitors. They portray restructuring as a misfortune that Bell could have avoided with better planning or that a smarter executive branch would have forestalled. In fact, Bell's extraordinary size and absolute market power, coupled with the lure of the growing telecommunications market, made increased competition in some form inevitable.

Most disappointing is that *The Fall of the Bell System* is long on description and short on analysis. Temin and Galambos neither evaluate the Bell divestiture nor give their views of the antitrust laws generally. Instead, by explaining how the principal players in the Bell drama—the Reagan administration, the Department of Justice, and a federal judge—did not understand the changes they were making in our economy, the authors argue that the *process* of the Bell divestiture did not make sense.<sup>8</sup> Temin and Galambos also describe reasons why divestiture may not work.<sup>9</sup> By focusing on these minor themes rather than the antitrust policies that were the real cause of divestiture, the authors suggest that Bell should not have been dissolved. That *The Fall of the Bell System* bursts with discontent over the divestiture process, while refusing to criticize the divestiture itself, reflects Bell's own ambivalence: unhappiness at what was lost but hope that the eight Bell companies will exploit deregulation to become even more dominant than in the past.

### I. Bell's Rise: The Wonder Years

The young Bell spurred its early growth by buying its competitors. Just before the First World War, the Justice Department forced Bell to stop acquiring companies and to sell Western Union.<sup>10</sup> In 1921, however, Congress passed legislation exempting Bell from antitrust restraints imposed by the Interstate Commerce Commission (ICC).<sup>11</sup> Bell returned to the market hungry for more. "Of the 234 independent companies purchased under the ICC's jurisdiction, the Bell system acquired 223."<sup>12</sup>

Concerned with Bell's power, Congress wrote into the Communica-

Another product of the same motive is Donald Katz's recent book on Sears, D. KATZ, *THE BIG STORE* (1987).

8. See *infra* Part IV.

9. See *infra* Part V.

10. See pp. 9-11.

11. See Willis-Graham Act, Pub. L. No. 15, 42 Stat. 27, 27-28 (1921).

12. P. 11.

tions Act of 1934 a requirement that the FCC study the contracts between AT&T and its subsidiaries.<sup>13</sup> The FCC issued a detailed report in 1939, finding that the prices charged by Western Electric, Bell's manufacturing arm, bore "no reasonable relation" to its costs.<sup>14</sup> In response to the FCC report, the Justice Department filed an antitrust lawsuit against Bell after World War II. That suit was settled in the balmy business climate of the Eisenhower administration with a 1956 consent decree that restricted Western Electric to manufacturing telephone equipment and Bell to providing communications services.<sup>15</sup> This accommodation stopped Bell from pushing its power into new markets, but the decree did not limit Bell's monopoly of the phone industry.

Bell was quick to agree to the 1956 decree, because its primary goal had always been to provide universal telephone service in the United States. By 1956 it had largely reached that goal. Seven out of ten American households had phones.<sup>16</sup> Little more than a decade later, Bell's assets of 53.3 billion dollars dwarfed those of the second largest American corporation, Standard Oil, at 19.2 billion dollars and those of the third largest, General Motors, at 14.2 billion dollars.<sup>17</sup> Bell had a million employees, compared to Standard Oil's 143,000 and General Motors' 700,000.<sup>18</sup>

The main components of the Bell System in its prime were the Bell Associated Operating Companies, which handled the local exchanges; the Long Lines Department, which was responsible for long distance calls; Western Electric, which made phone equipment; and Bell Laboratories.<sup>19</sup> Although Bell Labs invented many products, such as the transistor and the laser, that would have started whole new industries for most companies, Bell remained focused on telephones.

Historically, the major problem for Bell and its regulators was how to allocate prices between local and long distance service. Under the pricing structure imposed by the FCC, Bell used long distance revenue to subsidize its local phone service.<sup>20</sup> This subsidy grew as wages, a large

13. See Communications Act of 1934, Pub. L. No. 416, § 211(a), 48 Stat. 1064, 1073 (codified as amended at 47 U.S.C. § 211 (1982)); p. 11 & n.4.

14. See pp. 14-15 & 14 n.12.

15. See p. 15.

16. P. 16.

17. P. 10.

18. P. 10.

19. See pp. 11-14.

20. Bell had traditionally split up calls "board-to-board"; the portion of a long distance call from one company's exchange ("board") to another was long distance, but the call from the board to the user's phone (the "station") was local. A substantial part of long distance costs were billed as local. Pressure from the FCC and a Supreme Court decision, *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133 (1930), led Bell to switch to "station-to-station" accounting. Under this method, the long dis-



## The Bell System

component of local service costs, increased while technological innovations reduced the cost of long distance service.<sup>21</sup>

Regulated pricing created a large gap between long distance prices and costs. The surplus profits available from providing long distance services to a constantly expanding market were bound to attract competitors, and they did. The pressure of competition was first reflected in a 1959 FCC consent decree that allowed competitors to offer private microwave services on high frequency lines when Bell could not provide the same service.<sup>22</sup> These services were extremely limited; for a long time they could not even be shared among customers.<sup>23</sup>

A more significant incursion into the Bell monopoly came in 1963, when Microwave Communications, Inc. (MCI) applied to build a private line between St. Louis and Chicago.<sup>24</sup> MCI wanted its customers to be able to use their phones to connect into MCI's private line. The FCC approved the request, believing only a limited part of Bell's market was at stake.<sup>25</sup>

MCI and other companies immediately flooded the FCC with applications to build private lines in other parts of the country. The FCC decided that it could not review these applications individually. In *Specialized Common Carriers*,<sup>26</sup> the most significant of its decisions about Bell, the FCC approved the applications of specialized carriers like MCI and allowed them to compete with Bell in the long distance market.<sup>27</sup>

At the same time, the FCC continued to increase Bell's required subsidy of local rates. The subsidy forced Bell to keep its long distance prices high. By 1981, Bell's long distance revenues subsidized local service by over seven billion dollars, an extraordinary handicap even for a company as dominant as Bell.<sup>28</sup>

## II. The Amputation

The riddle that runs through *The Fall of the Bell System* is whether these competitive and regulatory pressures had to result in the breakup

tance call was a toll call from phone to phone. Revenues were separated by various formulas tied to use. See pp. 20-23.

21. See pp. 25-26.

22. See Allocation of Frequencies in the Bands Above 890 Mc., 27 F.C.C. 359, 403-13 (1959); pp. 29-31.

23. See p. 30.

24. See p. 47.

25. See Applications of M.C.I. for Construction Permits, 18 g F.C.C.2d 953 (1970).

26. 29 F.C.C.2d 870, *aff'd sub nom.* Washington Utils. & Transp. Comm'n v. FCC, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975).

27. See pp. 51-53.

28. See p. 357.

of AT&T. The authors blame the inevitability of Bell's partition primarily on the decisions of three men: John deButts, Harold Greene, and William Baxter. In 1973, a year after he became Bell's chairman, deButts delivered a major policy speech to the National Association of Regulatory Commissioners.<sup>29</sup> In that speech deButts aligned Bell firmly with its old goal of universal service. DeButts believed that competition was inconsistent with the regulatory goals of cheap and universal local phone service. DeButts complained that the "contrived" competition allowed by the FCC was unfair, because Bell was not allowed to compete; he declared that Bell's "unusual obligation" was to oppose competition and to favor regulation.<sup>30</sup> He asked for a "laboratory on further experiments in economics" pending study of the desirability of competition in telecommunications.<sup>31</sup>

The authors claim that deButts hoped his speech would start a reasoned public debate.<sup>32</sup> If this claim is accurate, the speech was one of the costliest corporate miscalculations imaginable. It was widely viewed as a statement of defiance, and response to it was swift. Officials from the FCC, the Department of Defense, and the Justice Department met after the speech.<sup>33</sup> The Justice Department, which had been internally circulating a draft antitrust complaint against Bell since the sixties, sent Bell a civil investigative demand.<sup>34</sup> A year later, in November 1974, it filed the lawsuit that would end Bell as we knew it. MCI filed its own antitrust lawsuit against Bell in the same year.<sup>35</sup>

Bell took an aggressive position in the courts, but its primary focus was on Congress. Its legislative efforts turned out to be surprisingly inept for a company that had acquired and maintained its power by successfully currying favor with regulators and politicians. Bell prepared a bill that was a phone company fantasy. The bill would have let Bell keep existing subsidized rates while dropping long distance prices to meet the prices of new entrants.<sup>36</sup> This was an attempt to maintain monopoly prices generally but with the flexibility to cut prices just long enough to drive out the occasional competitor. Worse, Bell introduced the bill too late to pass in one session and failed to consult the congressman in charge of the subcommittee that studied the bill.<sup>37</sup> This sloppy oversight

29. See pp. 95-99.

30. See p. 97.

31. See p. 98.

32. See p. 96.

33. See p. 100.

34. See p. 101.

35. See p. 107.

36. See pp. 119-20.

37. See pp. 120-21.

ensured the legislator's continuing hostility. For the next several years, Bell could not raise enough votes to get its bill passed, but Bell's many supporters mobilized enough votes to kill competing bills.<sup>38</sup>

In the meantime, the Justice Department lawsuit, which had languished in the court of an ill judge, picked up speed. The case was reassigned to Judge Harold Greene in 1980. Judge Greene scheduled the case for trial in two years and indicated that he would no longer tolerate the litigation's slow pace.<sup>39</sup>

The final catalyst for divestiture was the Reagan administration's appointment of William Baxter as Assistant Attorney General for Antitrust. Because both the Attorney General and Deputy Attorney General had conflicts precluding their involvement with the litigation, Baxter became the senior government official in the case.<sup>40</sup> A free market ideologue, Baxter was skeptical of regulation. He wanted to separate the local operating companies from the parent Bell, leaving it with the vertically integrated Bell Labs, Western Electric, and the long distance services.<sup>41</sup>

Baxter lacked support in the Reagan administration. Some of the most powerful cabinet members, including Secretary of Defense Casper Weinberger and Secretary of Commerce Malcolm Baldrige, wanted the case dropped. The Defense Department even drafted a study concluding that the Justice Department misunderstood the communications business.<sup>42</sup> Yet no one stopped Baxter. His charmed life may be traced in part to the lasting impact of the Dita Beard scandal, which left the Nixon administration wounded by its intervention in the International Telephone and Telegraph Company (ITT) merger and which made the Reagan administration "eager to avoid even the appearance of impropriety" in the Bell case.<sup>43</sup> The quirks of history that kept Baxter's two superiors off the case and gave Baxter free range would make some kind of divestiture inevitable.

Less than a year passed from Baxter's appointment in February 1981 to the divestiture announced to a surprised public on January 8, 1982.<sup>44</sup> Events moved inexorably to that result. Judge Greene pushed hard against both the government and Bell. Both began to fear that their

38. See pp. 120-31.

39. See pp. 200-03.

40. See pp. 217-19.

41. See pp. 220-21.

42. See p. 227.

43. See p. 229.

44. See pp. 274-75.

power to control the shape of a new Bell would shift by default to Judge Greene.

Baxter, under pressure from other administration officials, sought a continuance in July 1981 on the grounds that congressional legislation might resolve the lawsuit.<sup>45</sup> Judge Greene refused to delay. He made it clear that having invoked the court's power, the government would be bound by his decision unless the parties settled or dismissed the case.

Pressure mounted during trial after the Justice Department rested its case. Judge Greene denied Bell's motion to dismiss in a lengthy opinion in which he concluded that the evidence submitted by the government demonstrated "that the Bell System has violated the antitrust laws in a number of ways over a lengthy period of time."<sup>46</sup> Bell had recently lost the MCI case and an antitrust lawsuit filed by Litton within a matter of months.<sup>47</sup> Now the company was losing the government's lawsuit and began to worry that Judge Greene would order it to sell both Western Electric and Bell Labs. A lawyer from Covington & Burling hired to take a fresh look at the lawsuit agreed that Judge Greene might well find a basis for ordering full divestiture.<sup>48</sup>

Relief from Congress seemed unlikely.<sup>49</sup> Chairman Brown was scheduled to testify at trial after Christmas; he planned to testify that divestiture would be a disaster.<sup>50</sup> This testimony would have made it difficult, if not impossible, for him to support publicly any form of divestiture at a later date. Brown thus made the "biggest single decision that an American businessman has had to make in the last century."<sup>51</sup> He decided that dividing the companies was inevitable; within a few days he persuaded his board that he was right.<sup>52</sup> The final details were quickly worked up with Baxter, put down in a few pages, and formally accepted.

The authors devote a whole chapter to the details of the breakup.<sup>53</sup> In essence, the final agreement grouped the operating companies into seven regional companies that retained the local exchanges, pay phones, and the Yellow Page directories.<sup>54</sup> The parent AT&T (the operating companies kept the Bell name as a result of pressure by Tandy Corpora-

45. See pp. 227-33.

46. P. 252.

47. See pp. 230-31.

48. See pp. 261-62.

49. The authors discuss in detail the fate of various bills introduced in Congress. See pp. 116-31, 183-90, 235-49, 264-65, 283-87.

50. See p. 267.

51. P. 268.

52. See p. 268.

53. See ch. 7.

54. See pp. 284-85, 293-95, 302.

tion, a would-be competitor of AT&T)<sup>55</sup> got the long distance system, Bell Labs, and Western Electric. The operating companies had to give other long distance carriers the same access to their exchanges that they gave AT&T.<sup>56</sup>

### III. Did Bell Have to Go?

*The Fall of the Bell System* suggests that Bill Baxter and the slow advance of the 1974 lawsuit accomplished the destruction of Bell without anyone having a clear idea whether divestiture made economic sense and without any political support for the resolution of the conflict. The authors only briefly mention repeated findings that Bell violated the anti-trust laws.<sup>57</sup> They shirk their responsibility to analyze this evidence by stating that the book is not the place to deal with questions of "intent."<sup>58</sup> The only area in which the authors express an opinion on divestiture is in their discussion of the equipment market: they do admit that "[t]he case for competition in telecommunications equipment seems clear."<sup>59</sup>

Temin and Galambos suggest that economists have not yet learned how to measure economies of scale accurately.<sup>60</sup> This position may explain why the authors avoid giving any final opinion on whether local or long distance phone service is best served by one company or several. In tone, however, the authors are clearly skeptical about divestiture.<sup>61</sup>

Without a discussion of the economic effect of Bell's conduct on its would-be competitors, it is small wonder that the events Temin and Galambos describe appear arbitrary, as if a bureaucratic Napoleon (Baxter) overwhelmed the combined forces of Bell, the government, and good sense. The months spent researching Bell files and talking to Bell employees may have made this bias inevitable, but it diminishes the authors' contribution.

The unavoidable fact about Bell is that it was a monopoly that grew through acquisition and maintained its power through protective regulation, self-dealing, and exclusion of competitors. Its growth was not solely a result of efficiency and business acumen. The company acted quickly and ruthlessly to keep competitors out of the market. For example, when the FCC first allowed extremely limited private microwave

55. See p. 302.

56. See pp. 297-99.

57. See pp. 155, 158, 177, 231.

58. P. 251.

59. P. 354.

60. See p. 355 n.22.

61. See pp. 353-66.

services, Bell responded by proposing its TELPAK rates.<sup>62</sup> Bell proposed to set its prices at its marginal cost. These rates could have cut Bell's prices by up to seventh-eighths. An FCC study showed that Bell would be getting only a 0.3 percent return on its investment at the TELPAK prices (compared to its standard 7.5 percent return).<sup>63</sup> To let Bell meet competition but keep its research base, its decades of experience (both in technology and marketing), and its unparalleled brand identification was to guarantee that Bell would beat any competition. The rate proposals bogged down in years of regulatory proceedings.<sup>64</sup>

Another example of Bell's exclusionary conduct occurred with the Carterfone, a new device that let callers use their phone receiver to activate a radio telephone message.<sup>65</sup> Bell first refused to let its customers connect the Carterfone at all. Bell later modified its position and announced that it would allow an interconnection only under a "protective coupling arrangement" (PCA) that required a customer to purchase a special interface from Bell.<sup>66</sup> Bell claimed to be concerned about protecting the integrity of its exchanges; this concern just happened to impose an extra cost for using non-Bell equipment. Not surprisingly, the PCA requirement led to customer complaints, and the FCC ultimately decided that other companies could hook up without paying any separate charge.<sup>67</sup>

Bell's responses to MCI's growing competition in the early 1970s provide a particularly telling example of ruthless exclusionary activity. Bell decided to meet the MCI challenge with a differential tariff that imposed lower rates on high density routes to approximate the prices of MCI and other carriers.<sup>68</sup> Bell also tried to limit MCI's interconnection to restricted geographic areas and to require lump-sum prepayments of hook-up costs.<sup>69</sup> MCI persuaded a trial court to order Bell to allow intercity connections with foreign exchanges, but when the order was reversed on appeal, Bell immediately shut off MCI before MCI could help its customers make other arrangements.<sup>70</sup> The FCC ordered interconnection one week later.<sup>71</sup>

62. See pp. 31-32.

63. See p. 38.

64. See p. 40.

65. See pp. 42-43.

66. See pp. 42, 46.

67. See pp. 63-64.

68. See pp. 76-77.

69. See p. 102.

70. See pp. 105-06.

71. See Bell System Tariff Offerings of Local Distribution Facilities for Use by Other Common Carriers, 46 F.C.C.2d 413, 435-36 (1974); p. 106 n.60.

## The Bell System

MCI was still limited to private lines. In 1974, when MCI filed for its "Execunet" city-to-city lines (that any customer in each city could use) the FCC ruled, after Bell's strong opposition to MCI's filing, that this service was not authorized.<sup>72</sup> The Court of Appeals for the District of Columbia reversed, holding that the restriction of MCI to private lines was illegal.<sup>73</sup> In a sweeping decision, Judge Wright held that the FCC did not have authority to restrict long distance services unless it affirmatively found that public convenience and necessity mandated such restrictions.<sup>74</sup>

Bell's hostility throughout this period wreaked havoc on potential competitors. MCI had nearly been driven into bankruptcy before new investors took over the company in 1968 and infused it with funds.<sup>75</sup> The company survived because it was small, nonunion, and able to cut every possible corner.<sup>76</sup>

Bell's anticompetitiveness was obvious to everyone who cared to look. The Justice Department first sued the company for antitrust violations before World War I.<sup>77</sup> The FCC's 1939 study of Bell concluded that Western Electric's prices were uncompetitive and increased the cost of phone service.<sup>78</sup> That study led to the second Justice Department lawsuit, which sought to separate Western Electric from Bell, and to the 1956 consent decree.<sup>79</sup> The FCC obviously saw the need for increased competition and gradually expanded the access of companies like MCI to the Bell exchange.<sup>80</sup> A task force appointed by President Lyndon Johnson and chaired by Eugene Rostow, a study conducted by Arthur D. Little for Congress in 1977, a study by International Business Machines (IBM) in the same year, and a detailed industry review by Congressman Timothy Wirth's staff all concluded that government should restore competition to the telecommunications industry.<sup>81</sup> Even a 1972 Bell-commissioned study by McKinsey & Company found that the company was not efficiently organized to serve its customers and suggested a

72. See pp. 131-33.

73. See *MCI Telecommunications Corp. v. FCC*, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978); p. 134.

74. See *MCI Telecommunications Corp.*, 561 F.2d at 374; pp. 134-35.

75. See p. 47.

76. See p. 50. In one of the more amusing anecdotes that illustrates its ability to cut corners, MCI argued that employees in rural offices did not need restrooms because they could use surrounding fields. See p. 50.

77. See pp. 9-10.

78. See p. 14 nn.11-12.

79. See pp. 14-15 & 15 n.13.

80. See pp. 54, 68, 136.

81. See pp. 53, 124 n.23, 127-28, 264.

large number of changes, most of which were not adopted.<sup>82</sup> Bill Baxter, the most conservative Assistant Attorney General for Antitrust in recent years, a man with a poor record of antitrust enforcement generally<sup>83</sup> and the man who dropped the IBM case on the same day that he announced the Bell split-up,<sup>84</sup> agreed that the companies needed to be divided.<sup>85</sup>

Most strikingly, two juries decided after lengthy trials that Bell had violated the antitrust laws.<sup>86</sup> Judge Greene seemed to be well on his way to reaching the same decision when the government's lawsuit was settled. The MCI jury verdict was substantially affirmed in a lengthy majority opinion that found sufficient evidence to show that Bell had unlawfully refused to connect MCI to Bell's local exchanges, unlawfully disconnected MCI customers, acted anticompetitively in choosing where it would offer interconnection, provided inadequate equipment to competitors, and made sham filings with state regulatory commissions.<sup>87</sup> In the government's pending antitrust action against Bell, Judge Greene dismissed the government's claim over anticompetitive equipment pricing, but he found support for most of the other monopolization claims, including monopolization in the terminal equipment market and monopoly leveraging in Bell's refusal to connect long distance carriers to the local exchange.<sup>88</sup> These findings deserve more emphasis than they receive in *The Fall of the Bell System*.

#### IV. Who Is Responsible for Divestiture?

The authors' failure to consider Bell's antitrust violations seriously clouds their analysis of the reasons for divestiture. For instance, the authors portray a few individuals as having an extraordinary impact on Bell's demise. The prime movers are deButts, with his resolve to oppose competition; Judge Greene, with his refusal to delay litigation; and Baxter, with his resistance to other administration officials and refusal to

82. See p. 79. The company's own study of its research and development operations came to many of the same conclusions. See p. 81.

83. See generally Litvack, *Government Antitrust Policy: Theory Versus Practice and the Role of the Antitrust Division*, 60 TEXAS L. REV. 649, 655-56 (1982) (criticizing Baxter for sacrificing the purposes and goals of antitrust laws for the sake of maximizing economic efficiency); cf. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEXAS L. REV. 661, 702-03 (1982) (defending the Reagan administration's antitrust policy of not prosecuting violators).

84. See p. 282.

85. See pp. 220-22.

86. See pp. 340-42.

87. See *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1131-33, 1145-47, 1150-58 (7th Cir.), cert. denied, 464 U.S. 891 (1983). The special verdict is reprinted at *id.* at 1207-09. Bell did do well on MCI's predatory pricing claims. The jury found the TELPAK prices lawful, and the Seventh Circuit reversed the jury's finding for MCI on the "Hi-Lo" tariff. See *id.* at 1111-28.

88. See *United States v. AT&T*, 524 F. Supp. 1336, 1352, 1357, 1380-81 (D.D.C. 1981).



waver in the face of uncertainty over trial. These three men were the immediate causes of the divestiture, but the authors underestimate the extent to which Bell's inherent anticompetitiveness brought on the changes they describe. Bell's monopoly had flourished in contradiction to the antitrust laws. The monopoly was maintained only by legislative protection. Even then, the protection was at best an uneasy truce interrupted by Justice Department lawsuits and consent decrees. Had deButts been a more skilled politician, had the President been more forceful, had Baxter been ineffectual, had the judge not been Judge Greene, antitrust and economic pressures would have continued to push Bell apart.<sup>89</sup> Its rich markets would still beckon new competitors. Its stable profits and sheltered position would still affront Congress and the antitrust laws. Its exclusion of other companies from its own markets would still raise economists' eyebrows. Strong personalities may have determined when and how Bell was split up, but even had the coincidence of history brought to power a group of equally forceful personalities who preferred the status quo, it is unlikely that Bell proponents could have done more than delay some form of divestiture.

The authors also criticize unfairly the political institutions involved in the divestiture. They view the government as a poorly structured group of ineffective organizations that failed to understand the damages they were proposing. All the central institutions—the FCC, the executive branch, Congress, the courts, and, for that matter, Bell itself—were, in the authors' portrait, overwhelmed by events outside their control. The theme that government officials cannot make realistic plans bolsters the authors' implicit argument that big businesses are better left alone.

The authors criticize the FCC for the naive belief that allowing a few entrants like MCI into the market would not eventually jeopardize Bell's larger business.<sup>90</sup> They contend that the FCC's decision in *Specialized Common Carriers* to let other carriers join the market ushered in "a radical change that seems not to have been intended by most of the FCC commissioners."<sup>91</sup> They criticize the FCC harshly: "The Commission embarked on a cumulative process with almost no understanding of the forces it was setting in motion. It failed to see prices—particularly the

89. Cf. p. 351 ("It is . . . too much to insist that people should foresee a tangled and uncertain future. But a more flexible approach by AT&T's leadership in the mid-1970s might have offered room for compromise before the pressure for change reached its climax late in 1981.")

90. See, e.g., p. 31 (stating that the FCC had "failed to take the company seriously" regarding certain allegedly "self-serving" claims that turned out to have been "prescient"); pp. 50-51 (stating that "wishful thinking" had led the FCC bureau chief to "ignore the clear signs of danger"); p. 136 (characterizing the FCC as "oblivious to the economic and political pressures it was unleashing").

91. P. 52.

gap between regulatory and competitive prices—as incentives.”<sup>92</sup> Even the FCC’s first step, allowing competition in private microwave services, was “doomed to failure” because “[s]ooner or later, independent users of private microwave systems would want to connect their systems with the public switched network.”<sup>93</sup>

This criticism is unjustified. That competition would expand beyond microwave services and limited private line access was not inevitable. If anything, the FCC was a victim of its own success. Competition worked. MCI grew, and other companies joined the market. The FCC watched and approved most of these early changes. When it later sided with Bell in attempting to restrict full competition (a classic example of the regulators falling prey to the charms of the regulated), it was reversed by a court applying the earlier procompetitive policies that the FCC itself had put at the heart of regulatory policy in *Specialized Common Carriers*.

The authors also give the judiciary its share of criticism, although lawyers are likely to be pleased with the preeminence conferred upon the courts. Temin and Galambos argue that the judicial process took an autonomous course once the Bell case came before it: “[C]ourt proceedings, although very much part of the political process, have acquired an independence from interference that lets legal proceedings maintain a life of their own.”<sup>94</sup> Here too the authors are critical: “[T]he independence of the legal process is both its strength and its weakness: Judicial decision making can be swift, but it need not be informed.”<sup>95</sup>

The court emerges as a heavy-handed force pushing the trial to an end without appreciation for the consequences. Most striking to the authors is Judge Greene’s refusal to continue the lawsuit when both sides wanted more settlement talks. They quote the Judge:

“[It] is not my business if Congress wants to pass legislation to restructure the communications industry . . . I have nothing to do with that, . . . but to say I am supposed to hold up the trial . . . because in the next eleven months somebody may do something, and this may remove an obstacle to their doing something, it strikes me as peculiar.”

. . . “All I can do is sit here. I didn’t file the lawsuit. I didn’t pursue the lawsuit since September or November, whenever it was, 1974. I wasn’t even on this court at that time. The case came here. The case was pursued by the Department of Justice. The Department of Justice and the Administration have seen fit not to dismiss it. It is here. I have heard four months of testimony. We have had

92. P. 338.

93. P. 31.

94. P. 340.

95. P. 340.

## The Bell System

two and a half years of pre-trial maneuverings, and I am ready to proceed.”<sup>96</sup>

The quotation makes Judge Greene seem more concerned with his docket than with the national interest of more than two hundred million Americans in their phone system.

This criticism is also unjustified, because it ignores the antitrust problems that properly kept Judge Greene's attention. A case that ran from 1974 to 1981 was hardly a thoughtless rush into folly. The judiciary is supposed to apply laws, not test the political winds, and it should operate independently once a case comes before it. Judge Greene was faced with a long-standing lawsuit in which the Justice Department alleged numerous acts of monopolization by the largest corporation in the country. As the case proceeded, he came to believe that these allegations were well supported. The parties had made no progress without judicial pressure. If in the meantime Bell was injuring consumers while raking in monopoly profits, why should the case lag? It is also unfair to criticize Judge Greene for perceived defects in a settlement he approved but did not create. We still do not know what his final decision would have been (he had left for another day such core issues as Bell's regulatory preemption defense), nor do we know what remedy he would have imposed had he found antitrust violations. The consensual settlement may have been much harsher medicine than any relief that Judge Greene might have imposed.

The authors question the continuing oversight now vested in Judge Greene, contending that he “threatens to become another regulatory agency” as he supervises divestiture.<sup>97</sup> Yet the courts had supervised Bell's consent decrees for years. Any restructuring of the Bell System was bound to be complex, requiring detailed supervision, because the regulation to be undone had become so pervasive and intricate.

Temin and Galambos depict the executive branch as an incompetent body that opposed divestiture but lacked the will to force its own lieutenant, Baxter, to stop his assault on Bell. The authors cite the concern of Bell's general counsel, Howard Trienens, that the Reagan administration could not control its own Assistant Attorney General.<sup>98</sup> Such incompetence on detail may, of course, be the lasting hallmark of the Reagan administration—a sign of Ronald Reagan's personal touch. Apparently, the only input from Reagan was an anecdote he told at a cabinet meeting:

96. Pp. 232-33 (quoting Transcript of Proceedings, Tr. 4, at 8-10, *United States v. AT&T*, No. 74-1698 (July 29, 1981)).

97. P. 360.

98. See p. 234.

Reagan recalled that when he was a boy it cost two dollars to make a cross-country call and only two cents to mail a letter and that, at the time of his comment, the call and the letter each cost twenty cents.<sup>99</sup> If Reagan meant his comments as an instruction to leave Bell intact, he nevertheless made no other attempt to intervene with Baxter.<sup>100</sup>

More revealing of the administration's incoherence was Chairman Brown's call to Weinberger to announce the settlement. The Defense Department had been one of Bell's major supporters, and Weinberger had worked hard behind the scenes in attempts to convince Baxter to drop his lawsuit. Weinberger doubtless expected more pleas for help when he answered the phone:

Weinberger came to the phone and said that he had someone important there.

Brown replied, "Cap, I've got to talk with you."

Weinberger explained, "You know I've done all I can on this case," and started to elaborate.

Brown interrupted. "Cap, I've settled this thing."

There was a long silence, and then Weinberger invited Brown over to talk.<sup>101</sup>

It is extraordinary that individual government officials could have made decisions of this magnitude without other major administration officials having some knowledge that a settlement was near, especially a settlement that would dissolve the largest company in the country. It is not extraordinary, however, that Baxter prevailed. Omitted from *The Fall of the Bell System* is that Baxter could stand alone because he had a strong case. Had Baxter dismissed the lawsuit, there would have been an outcry, not because he was a bureaucrat running wild in Washington but because his case was grounded in a sensible law that retains widespread political support. That a top law enforcement officer pursued the law as he saw fit is hardly grounds for criticism.

99. See pp. 229-30. The most interesting example of Reagan's management by inattention is how Treasury Secretary Donald Regan developed tax reform, the hallmark of the Reagan administration. Having no direction from above, Regan reviewed all the President's economic speeches to identify the policies that he should pursue. See D. REGAN, FOR THE RECORD 142-44, 156-59 (1988). Regan decided that one appropriate policy was tax reform. Showing that he understood how to get the President's attention, Regan did not bother making the intellectual case for reform. Instead, he told Reagan that his secretary paid more federal taxes than sixty major corporations, including the President's former employer, General Electric. Reagan responded, "I agree, Don, I just didn't realize that things had gotten that far out of line." *Id.* at 194-95. Regan knew that this utterance was as close as the President would get to active management, and he "interpreted his words as an instruction to go full steam ahead with a proposal to overhaul the entire federal tax structure." *Id.* at 195. Had Regan been Attorney General, he doubtless would have read Reagan's anecdote on the price of stamps as a pointed directive to send Baxter packing back to Stanford.

100. See p. 229.

101. P. 274.

## The Bell System

Temin and Galambos put great emphasis on the role of "ideology," which they pass off as something akin to fickle public opinion.<sup>102</sup> They believe that the post-Watergate distrust of institutions and a shift in economic ideology explain why Bell did not receive more support from the general public. This theme grossly understates the depth of public belief in the "ideology" that really explains the changes—the ideology embedded in our antitrust laws. Bell was subject to antitrust action even during conservative times, and its empire was finally dismantled by the most probusiness, promoter, proconcentration administration in our history. Bell's break-up was inevitable, even had we been spared Watergate and Vietnam and the ideology that those two political traumas left in their wakes.

### V. Will Divestiture Work?

The question of most concern now is whether we will be better off after divestiture. The seven operating companies that Bell brought forth have kept their power over their markets and prospered.<sup>103</sup> Fears that they would not survive outside the nest have proved groundless. The effect of divestiture on AT&T is less certain. The company has shrunk. "It resembled Vienna after World War I more than West Germany after World War II."<sup>104</sup> Competition has intensified in the equipment and long distance markets.

Temin and Galambos do not think that the past success of MCI is a good predictor of whether competition will bear fruit in telecommunications. To them, the past growth of other long distance companies "carries no information about the viability of competition" today.<sup>105</sup> This is because MCI and the rest built their businesses on two artificial advantages unavailable to Bell: they did not have to subsidize the local exchanges, and they could concentrate their long distance services on the high profit, low cost urban markets.<sup>106</sup>

The authors clearly do not believe that technological advances justify the shift to competition. They note that optical fiber, a cable-based technology like that used in the first phones, has replaced the temporary use of microwave transmission.<sup>107</sup> "To the extent that the Bell System

102. See pp. 78, 337.

103. See pp. 354, 364.

104. P. 364.

105. P. 356.

106. There actually was a third subsidy; the parsimoniousness of California regulators forced the non-California systems to subsidize Pacific Telephone and Telegraph Company, whose rates have been artificially depressed for years. See p. 145.

107. See p. 347.

was broken up to usher in the age of microwave radio, the government forced a permanent shift in the industry's structure to take advantage of a temporary technical opportunity—which has already been superseded for most high-density uses.”<sup>108</sup> The new technology may actually increase the efficiency of a single network, and AT&T may end up as the only long distance phone company or as “the dominant member of a very small oligopoly.”<sup>109</sup>

One gamble of divestiture is that competition will bring innovation and new products that more than compensate for any lost economies of scale. The authors do admit that prices should fall and that products should improve in the short run.<sup>110</sup> These benefits will go to long distance callers and business users in particular.<sup>111</sup> But the authors fear that Bell will have to build planned obsolescence into products that it formerly built to last and that competition will remove the secure financial basis for Bell Labs.<sup>112</sup> If the gains in pure research are primarily economic externalities, the new competitors cannot be expected to fill the shoes of Bell in the days when it was protected from competition.<sup>113</sup> The authors harbor great doubt about the competition between AT&T and IBM that comforted Bill Baxter when he deregulated AT&T and set IBM free.<sup>114</sup> Finally, the authors contend that any economies of scale based on the interconnections within the Bell System will be lost.<sup>115</sup>

The future portrayed in *The Fall of the Bell System* is not particularly attractive:

[D]ivestiture must be looked on as an enormous gamble. It is part of a general experiment in competition as a way of organizing previously regulated industries. Telecommunications was unique among these industries, both because of the dominance of a single firm and because of the presence of an interactive network. Only in the long run will we know—and possibly not even then—if the competitive market can innovate as well as the integrated Bell System.<sup>116</sup>

Divestiture inevitably will increase local rates and decrease long distance charges. Bell can no longer subsidize the operating companies, and

108. P. 347.

109. P. 356.

110. See p. 362. A recent interview with Judge Greene indicates that he feels divestiture has been an unqualified success along these lines. See Mesce, *Phone System Enters a New Era*, Houston Chron., Dec. 11, 1988, § 6, at 2, col. 1.

111. See p. 365.

112. See p. 359.

113. See p. 360.

114. See p. 361.

115. See p. 362.

116. P. 365.

## The Bell System

it no longer needs to. Theoretically, if the poor make mostly local calls, they will be hurt the most (unless the new system proves so much more efficient that even the cost of local calls is reduced). Once the move to divest got into high gear, however, the principal actors—Judge Greene, Baxter, and Brown—were under no pressure to weigh the benefit this subsidy conferred on the poor against the value of a more efficient market. Although the subsidy was always the best political justification for Bell's monopoly, in the end neither Congress nor the executive branch did anything to slow the movement toward divestiture.

Nothing prevents Congress, however, from imposing the same subsidy on the several companies that may replace Bell. The subsidy has always been cumbersome, and it would present little more difficulty if a few more companies were involved. The antitrust laws should not be held hostage to other political goals that Congress can easily achieve through legislation, and bureaucrats charged with enforcing the antitrust laws should not be forced to speculate about other legislative goals that are not enshrined in statute.

The authors' worries about the future are not warranted. They themselves show repeatedly how Bell had become unresponsive to the needs of its customers. Much of their book is a critique of Bell's organizational rigidity.<sup>117</sup> Bell ultimately resisted even changes its own customers wanted. For example, when digital switching became available for private exchanges, Bell refused to adopt the new technology, because its engineers thought the traditional analogue switches worked just fine.<sup>118</sup> Bell ignored pressure from its salespeople long after it became clear that the customers wanted digital switches.<sup>119</sup> The company was still run by engineers who ignored the new markets that were opening up as telecommunications grew more sophisticated. These internal problems are good evidence that even a smart monopolist has trouble matching the vitality of healthy competitors. It probably is no accident that other dominant companies of yesterday, from U.S. Steel and General Motors to Sears and BankAmerica, are also seeing their market power slip from their grasp.<sup>120</sup>

Nothing in the long history recounted by Temin and Galambos

117. See pp. 57-68, 78-95, 142-75.

118. See pp. 75-76.

119. See pp. 150-51.

120. This point is brought home in two recent corporate histories, one discussing America's largest retailer and the other discussing the bank that was once America's largest. See G. HECTOR, *BREAKING THE BANK: THE DECLINE OF BANKAMERICA 1* (1988) (describing the fall of BankAmerica from 1980 to 1986); D. KATZ, *supra* note 7, at viii (noting the rapid decline of Sears' market share and stock value).

proves that Bell deserved to be spared normal competitive pressures or that it had earned the right to protection from the antitrust laws. The political purpose of the antitrust laws, all but forgotten in today's make-believe world of Chicago School economics,<sup>121</sup> certainly supports divestiture. Bell controlled a million workers. The company was larger than all but our largest cities. It owned a tremendous chunk of the economy. The speculative possibility that Bell might perform better than its competitors is precious little justification for governmental protection of such an unparalleled concentration of power. It is far better to have three or four companies with divergent interests competing for political power than a single company with a million voters and virtually limitless resources.

The economic benefits of divestiture point to the same conclusion. Increased competition should lead to more and better products and to lower prices. Consumer choice, both for phone equipment and phone services, has already increased. The authors suggest that consumers may be frustrated by all of their new choices.<sup>122</sup> But if consumers prefer not to be confused by new services, they can stick to whatever the Bell operating companies provide. Competitors then will have to copy Bell's existing services or go out of business. The authors' paternalistic concerns fail to justify suppressing the choices of the free market and denying consumers the freedom to decide what products and services they want in telecommunications.

Uncertainty about the future is a sign of inmarket strength, not weakness. Markets are dynamic and unfaithful. That is why the antitrust laws articulate broad concepts that the courts must adapt to changing market experience. The principle that the free interplay of companies struggling to capture the highest market share leads to lower prices and better products is the heart of modern economic theory.<sup>123</sup> Indeed, this principle occupies the center of much conservative thinking about antitrust law.<sup>124</sup> In theory, competition improves services, lowers prices, and quickens the imaginations of all involved. In the well-tested judgment of the Congress that passed the Sherman Act, a judgment tempered by the wisdom of political battle and economic suffering, economic competition is also a necessary protector of political freedom. Any exception to the

121. For explications of Chicago School economic analysis of law, see Ackerman, *Law, Economics, and the Problem of Legal Culture*, 1986 DUKE L.J. 929, 940-51; Johnson, *An Appeal for the "Liberal" Use of Law and Economics: The Liberals Fight Back* (Book Review), 67 TEXAS L. REV. 659, 670-73 (1989).

122. See p. 362.

123. See, H. HOVENKAMP, *ECONOMICS AND FEDERAL ANTITRUST LAW* 1-14 (1985).

124. See generally R. POSNER, *ANTITRUST LAW* 3-13 (1976).



## The Bell System

principle of competition—particularly an exception that, like the one carved out for Bell, depends on governmental protection—should have clear and certain justification. None appears in this book.

Bell gave us good and inexpensive phone service, but who knows how good and inexpensive it would have been if competitors had been allowed into the market? Now we will find out.

